

Proposed Revisions to the City of San Diego Biology Guidelines: Wetlands Deviation Findings

A. Essential Public Project

Purpose & Intent

It is the intent of the City of San Diego that all City of San Diego departments and public projects approved by the City fully comply with the policies, regulations and management obligations Created on established as a result of the Environmentally Sensitive Lands Ordinance of the Municipal Code (ESL). However, deviation from the strict application of ESL regulations may be warranted when an essential public project serving basic infrastructure needs of the community or the region must be implemented and no feasible alternative exists which will strictly comply with the policies and regulations of ESL. The purpose of this deviation process is to provide a mechanism for relief from the strict application of wetland ESL regulations when necessary to implement an essential public service projects that cannot be located elsewhere. For the purposes of this discussion, essential public projects will be limited to public projects identified in City land use plans adopted prior to January 1, 2000 and to linear infrastructure (e.g., waterlines, sewers, and roads) identified in adopted City land use plans.

Findings

Deviation from the ESL will be considered when a proposed project meets all of the following criteria:

1. *The project is an Essential Public Service Project identified in an adopted City Land Use Plan; and*

The project is an essential public service project (e.g., circulation element road, trunk sewer, water main) that will service the community at large and not just a single property. The project must be identified in an adopted City *land use plan* that envisioned the development of the project and must still be essential in both location and need.

2. *The proposed project and all project alternatives, both practicable and impracticable, are fully disclosed and analyzed in an appropriate CEQA document; and*

Alternatives to the proposed project have been comprehensively included in the CEQA document and/or the biological technical report of the CEQA document (e.g. Mitigated Negative Declaration). Alternatives must include the following: 1) A no project alternative; 2) A wetlands avoidance alternative, including an analysis of alternative sites irrespective of ownership; and 3) An appropriate range of substantive wetland impact minimization alternatives. Public review of the environmental document must occur pursuant to the provisions of CEQA. Projects proposing to utilize this deviation section of the ESL after initial CEQA public review must include the new information and recirculate the CEQA document.

3. *The potential impacts to wetland resources have been minimized to the maximum extent practicable; and*

The project is the least environmentally damaging practicable alternative considering all the technical constraints of the project (e.g., roadway geometry, slope stability, geotechnical hazards, etc). Recognizing the wetland resources involved, minimization to the maximum extent practicable may include, but is not limited to, pipeline tunneling, bridging, Arizona crossings, and/or arch culverts that maintain full hydrologic function and wildlife movement. The project applicant will solicit input from the Resource Agencies prior to the first public hearing.

4. *The proposed project has fully mitigated its impacts according to the Biology Guidelines.*

All impacts have been mitigated according to the requirements of the City's Biology Guidelines and the project would not have a significant adverse impact to the MSCP. Mitigation has been provided pursuant to Table 2 of the Biology Guidelines.

B. Economic Viability

Purpose & Intent

It is the intent of the City of San Diego to ensure that all private development shall fully comply with the policies, regulations and management obligations established under the ESL. It is also the intention of the City to respect constitutionally protected private property rights. In rare circumstances, it may be necessary to deviate from the strict application of ESL regulations in order to preserve a private property owner's right to an economically viable use of property pursuant to current U.S. Supreme Court takings law. The purpose of this deviation process is to disclose, evaluate and objectively determine the economic viability of a proposed project with and without the granting of a deviation. This process is intended to ensure that if a deviation is to be granted for economic viability, it will only be done for circumstances not of the *applicant's* making. This means that a deviation should not be granted to achieve economic viability when the primary reason a project is economically unviable, absent the deviation, is because of a poor investment decision by a land owner. An economic viability deviation should not be based solely on a prospective rezone. Any deviation for economic viability should be the minimum necessary to achieve economically viable use of the property. In the case where the findings below can be made, it is the intent of the City at its sole discretion to offer to compensate willing sellers at market value for protection of high quality wetlands depending on funding availability and acquisition priorities. Any offers to acquire the property and the results of the offer will be presented to the City decision-maker at the time they consider the Economic Viability Finding.

Findings

Deviation from the ESL will be considered when a proposed project meets all of the following criteria:

- 1. *Applicant has disclosed and provided all information for the City to determine whether the deviation is necessary to achieve an economically viable use of the property, including all of the following required information:***
 - a. A range of project alternatives that include the no project alternative, a wetlands avoidance alternative, and alternative(s) that show substantive minimization of impacts to wetlands.
 - b. The date the *applicant* purchased or otherwise acquired the property and from whom.
 - c. The purchase price and the documentary transfer tax paid by the *applicant* for the property. The *applicant* must provide for a current appraisal to establish that the purchase price was appropriate given market value at the time of purchase. The appraisal shall be prepared by an outside appraiser with recent experience in the type of appraisal being requested, and supervised by the City of San Diego Real Estate Assets Department. The *applicant* will deposit monies into a special fund established by the City to hire, supervise and pay for the appraisal and associated

City staff costs. The City will use a revolving list of qualified outside appraisers to prepare appraisals. All appraisals must be prepared by an appraiser licensed in the State of California and be in compliance with current Uniform Standards of Professional Appraisal Practice. All appraisers considered for selection will be required to fully disclose their employment history prior to selection. Any communication between the *applicant* and the appraiser shall occur only in the presence, which includes conference calls, of designated City staff. City staff shall respond to all third party requests in a timely manner. For the purposes of this section, *applicant* shall include the *applicant's* employees and shall not include the *applicant's* consultants, design professionals, contractors, and subcontractors. Comparable land values used for this purpose should have similar restrictions, to the maximum extent possible, as those on the property as identified in 1(d) below. The final complete appraisal shall be available to the City decision-maker and interested public prior to the discretionary hearing. An appraisal summary statement shall be provided to the City decision-maker for the discretionary hearing.

- d. The general plan, zoning or similar land use designations applicable to the property at the time the *applicant* acquired it, as well as any changes to these designations that occurred after acquisition.
- e. Any development restrictions or other restrictions on use, other than government regulatory restrictions described in (d) above, that applied to the property at the time the *applicant* acquired it, or which have been imposed after acquisition.
- f. Any change in the size of the property since the time the *applicant* acquired it, including a discussion of the nature of the change, the circumstances and the relevant dates.
- g. A discussion of whether the *applicant* has sold, leased, or donated a portion of or interest in, the property since the time of purchase indicating the relevant dates, sales prices, rents, and nature of the portion or interests in the property that were sold or leased.
- h. Any title reports, litigation guarantees or similar documents in connection with all or a portion of the property of which the *applicant* is aware.
- i. Any offers to buy all or a portion of the property which the *applicant* solicited or received, including the approximate date of the offer and offered price.
- j. The *applicant's* costs associated with the ownership of the property, annualized to the extent feasible, for each of the years the *applicant* has owned the property, including property taxes, property assessments, debt service costs (such as mortgage and interest costs), and operation and management costs.
- k. Any rent received from the leasing of all or a portion of the property and any income generated by the use of all or a portion of the property over years of

ownership of the property. If there is any such income to report, it should be listed on an annualized basis along with a description of the uses that generate or has generated such income.

- l. Topographic, vegetative, hydrologic and soils information prepared by a qualified professional, which identifies the extent of the wetlands on the property.
 - m. An analysis of the economic viability of alternatives discussed in (a), above (as required per CEQA and/or the 404 b(1) guidelines under the Clean Water Act) and an assessment of the economic viability of the project compared to the alternatives which takes into account all project costs, including mitigation. The analysis of alternatives shall include an assessment of how each alternative will impact all wetlands and environmentally sensitive lands adjacent to and within the overall project plan area.
2. ***The economic information has been reviewed by City staff and outside economic consultant, and the City Council makes findings that all economically viable use of a property will be removed with strict application of the ESL.***

The application for an economic viability determination has been reviewed by City Staff in consultation with a professional outside economic consultant. The economic consultant will provide an opinion to the City on whether any of the CEQA and/or 404 b(1) alternatives that avoid and minimize wetland impacts provide economically viable use of the subject property. The City Real Estate Asset Department will select a qualified outside economic consultant to develop an economic viability analysis. Any communication between the *applicant* and the economic consultant shall occur only in the presence, which includes conference calls, of designated City staff. The *applicant* will deposit monies into a special fund established by the City to hire, supervise and pay for the economic viability analysis and associated City staff costs. All consultants considered for selection will be required to fully disclose their employment history selection. The economic viability analysis must include an analysis of the project's cost burden (including all mitigation costs associated with the project), a residual land value analysis, market absorption and fiscal impacts analysis. City Manager recommendations to the decision maker shall discuss the economic viability information and professional opinion of the economic consultant, and reflect the independent judgment of the City Manager.

The full economic viability findings, City Manager recommendations and the economic consultant's professional opinion, including summary documentation provided by the economic consultant that is not proprietary ("trade secret") pursuant to the Public Records Act (California Government Code section 6250, et seq.) shall be available to the City decision-maker and interested public prior to the discretionary hearing. A summary report of the economic viability findings, City Manager recommendations, and professional opinion of the economic consultant shall be provided to the City decision-maker for the discretionary hearing.

3. ***The proposed project has avoided, minimized and mitigated to the maximum extent practicable, given the economic viability of the project.***

The project mitigation must conform to the Biology guidelines or the lack of full mitigation compliance must be justified as part of the economic viability determination. The deviation process will not be used solely to reduce or eliminate mitigation as required by the City of San Diego Biology Guidelines. The project applicant will solicit input from the Resource Agencies prior to the first public hearing.

C. Biologically Superior Alternative

Purpose & Intent

It is the intent of the City of San Diego to protect and manage biological resources in full accordance with the regulations of the ESL. However, in rare instances, a deviation from the strict application of the policies and regulations may be warranted if an alternative can be proposed by the project applicant that achieves a superior biological result which provides a clear net increase in quality and viability (functions and value) for the type of biological resource being impacted.

The purpose of this deviation is to describe a process for disclosing, evaluating and objectively determining the appropriate circumstances for when a Biologically Superior Deviation can be granted. It is the intent that this type of deviation process should only be used to impact low quality wetlands, including vernal pools. Proper analysis under this deviation process would justify a conclusion that if the deviation is granted, the lower quality biological resource is expendable in exchange for the extraordinary mitigation as identified by finding three below and offered to not only offset the loss of the resource but to also appreciably increase the overall function and value of the resource being impacted.

Because the following three projects have been reviewed by the agencies and include a regional wetland mitigation program into the planning process, they shall be considered exempt from making these deviation findings: 1) Pacific Highlands Ranch (Subarea III); 2) Torrey Highlands (Subarea IV; exemption does not include vernal pools); and 3) New Millenium/Otay Ranch within the City of San Diego.

Findings

Deviation from the ESL will be considered when a proposed project meets all of the following criteria:

1. ***The proposed project, including a no project alternative, a wetlands avoidance alternative and a biologically superior alternative is fully disclosed and analyzed in an appropriate CEQA document; and***

The CEQA document must fully analyze and describe the rationale for why the proposed project is considered to result in the conservation of a biologically superior resource

compared to strict compliance with the provisions of the ESL. Public review of the environmental document must occur pursuant to the provisions of CEQA. Projects proposing to utilize this deviation section of the ESL after initial CEQA public review must include the new information and recirculate the CEQA document.

2. *The wetland resources being impacted by the proposed project are of low biological quality; and*

Low biological quality will be specific to the resource type impacted (e.g, vernal pools, non-tidal-salt marsh, riparian, and unvegetated channels).

Factors to determine biological quality include:

- Diversity of native flora and fauna present.
- Rarity of the wetland community in light of the historic loss and remaining resources.
- Use of the wetland by federal and/or state endangered, threatened, sensitive, rare and/or other indigenous species.
- Proximity of the area to larger natural open spaces.
- Restoration potential.
- Significant hydrologic, water quality, or flood control value.
- Ecological role of the wetland in the surrounding landscape, including:
 - consideration of the current functioning of the wetland in relation to historical functioning of the system.
 - function of the wetland.
 - connectivity to other wetland or upland systems (including use as a stopover or stepping stone by mobile species).

Only wetlands with little or no economically practicable restoration potential considering their biological role in the surrounding landscape could be considered low quality. Presence of exotics is only one indicator of low biological quality.

Wetland quality will be thoroughly analyzed in the project's biological technical report given the factors listed in Tables 1, 2 or 3 and based on best available scientific information. Wetland quality determinations shall be a discretionary action made on a case-by-case basis, with not all low-quality factors required to make a low quality determination. Alternatively, the presence of any significant (e.g. in amount or degree) factor may preclude a determination of low-quality. All factors in the appropriate table shall be carefully considered when making a wetland quality determination.

The City's Wetlands Advisory Board shall review information provided by the applicant and provide an opinion to City staff and the City Manager on whether a wetland is of low quality through the CEQA process. The opinion of the Wetlands Advisory Board shall be reflected in the City Manager recommendations to the City decision maker, however, the project process should not be delayed if the Wetlands Advisory Board does not provide a response or cannot provide a response due to lack of quorum.

a. Vernal Pools: Determination of Low Quality

- (1) Characterizations of vernal pool flora and fauna must be accomplished during the proper seasons. Surveys must be done between December and May to ensure adequate characterization of the vernal pools. Adequate surveys should be done to determine ponding and vernal pool flora and fauna. Surveys for fairy shrimp must be done in accordance with current U.S. Fish and Wildlife Service fairy shrimp survey protocol.
- (2) Timing of the first rainfall and subsequent filling of the basins should be determined during the evaluation process. Rainfall and ponding should be monitored throughout the wet season.

**Table 1:
Factors for Considering Vernal Pool Quality**

Factors	Lower Quality Indicators
Endangered and Sensitive Species	No endangered or rare vernal pool species, as identified in the following list: <i>Brodiaea orcuttii</i> ⁺ , <i>Downingia cuspidata</i> , <i>Eryngium aristulatum ssp. parishii</i> , <i>Myosurus minimus var. apus</i> , <i>Navarettia fossalis</i> , <i>Orcuttia californica</i> , <i>Pogogyne abramsii</i> , <i>Pogogyne nudiusscula</i> , <i>Streptocephalus woottonii</i> * ⁺ When within vernal pool basins and watersheds. [*] When within vernal pools.
Flora and Faunal Diversity	Low species richness of vernal pool endemic plants and/or animals. Few individuals present.
Habitat Function	Few basins with a cumulatively small amount of habitat (basin surface area) relative to other nearby vernal pool complexes.
Potential for Ecosystem Enhancement	Severe compaction of the watershed. Unable to find historic basins. Basins isolated from areas of native pollinators (i.e., intact surrounding native uplands). Hardpan or clay substrate irrevocably damaged.
Status of Watershed	Watershed partially developed, irrevocably altered, or inadequate to supply water for vernal pool viability.
Source and Quality of Water	Urban runoff from partially developed watershed. Water source is in part or exclusively from human-caused runoff which could be eliminated by diversion.

b. Salt Marsh, Salt Panne, and Mudflats: Determination of Low Quality

- (1) Wetlands with either surface or sub-surface tidal-influence (e.g. coastal salt marsh, salt panne and mudflats) will never be considered low quality and are excluded from the biologically superior deviation process. A biologically superior deviations alternative must not be granted for tidally-influenced wetlands.
- (2) Characterizations of flora and fauna must be accomplished during the proper season. Surveys must be done at the most appropriate time to characterize the resident and migratory species.
- (3) Water and soil salinity testing should be conducted in areas of questionable tidal influence. Evaluations of tidal influence must include the highest spring and neap tides.

**Table 2:
Factors for Considering Salt Marsh, Salt Panne, and Mudflats Quality**

Factors	Lower Quality Indicators
Federal or State Listing	No use by federally and/or state endangered or threatened plant or animal species.
Habitat Function	Little or no function as coastal salt marsh, salt panne, or mudflat habitat, including habitat for migratory birds.
Potential for Ecosystem Enhancement	Low feasibility for restoration of tidal influence (e.g., > 1/4 miles).
Connectivity	Low connectivity to other wetland or upland systems (including little use as a stopover or stepping stone by mobile species), considering the resources.
Hydrologic Function	Volume and retention time of water within the wetland not significant enough to aid in water quality improvements. No significant flood control value or velocity reduction function.

c. Freshwater or Brackish Wetlands: Determination of Low Quality

- (1) Tidally influenced brackish wetlands will never be considered low quality and are excluded from the biologically superior deviation process.
- (2) Characterizations of freshwater and brackish wetlands flora and fauna must be accomplished during the proper season. Surveys must be done at the most appropriate time to characterize the resident and migratory species.

- (3) Hydrologic evaluations of the effects of any impacts on the upstream and downstream biota and flooding must be conducted as part of the review process.

**Table 3:
Factors for Considering Freshwater and Brackish Wetland Quality**

Factors	Lower Quality Indicators
Federal or State Listing	No use by federal and/or state endangered or threatened plant or animal species.
Flora and Faunal Diversity	Low species richness of native plants and/or animals present.
Habitat Function	Little or no function as freshwater wetland habitat, including habitat for migratory birds.
Ecological Role of the Wetland	Project would not change or alter historic functions of the wetland in its regional context. Historical functioning of the wetland was and is low. The wetland is small and isolated from other wetlands.
Potential for Ecosystem Enhancement	Within the context of the surrounding landscape, there is low feasibility for enhancement/restoration to significant habitat or hydrologic functioning.
Connectivity	Low connectivity to other wetland or upland systems (including little use as a stopover or stepping stone by mobile species), considering the resources.
Hydrologic Function	Volume and retention time of water within the wetland not significant enough to aid in water quality improvements. No significant ground water recharge occurs within the wetland (based on drainage study). No significant flood control value or velocity reduction function.

3. ***The proposed project and proposed mitigation results in a biologically superior net gain in overall function and values for the type of wetland resource being impacted; and projects impacting low quality wetlands mitigate for their impacts as described below.***

Project mitigation shall include:

- a. Wetland creation or restoration of an equal acreage of the same type of wetland resource that is being impacted. For every one acre of wetland resource being impacted at least one acre of the same type of wetland habitat must be created or restored (i.e., “in-kind” mitigation resulting in no-net loss); and

- b. Additional acreage that is necessary to meet the mitigation requirements set-forth below can be provided by:
- (1) Additional restoration or creation of the same type of wetland being impacted;
 - (2) Off-site acquisition and permanent conservation of existing high quality wetlands of the same type being impacted, and/or
 - (3) Enhancement of low quality wetlands of the same type being impacted that result in high quality wetlands.

All proposed mitigation must demonstrate an increase in the overall function and values for the type of *wetland* resource being impacted compared to the pre-mitigation conditions. Increased function can include an increase in the availability of habitat for native fauna, an increase in native flora diversity, a decrease in invasive species, an increase in ground water recharge, water quality improvements and sedimentation deposition rates. Success criteria using best currently available information for the particular resource being impacted will be required as part of the restoration plan.

Mitigation for projects impacting vernal pools shall include salvage of sensitive species from vernal pools to be impacted, introduction of salvaged material into restored vernal pool habitat where appropriate (e.g. same vernal pool series), and maintenance of salvaged material pending success of restored vernal pools. Salvaged material shall not be introduced to existing vernal pools containing the same species outside the vernal pool series absent consultation with and endorsement by vernal pool species experts not associated with the project (i.e. independent expert).

Superior Biological Mitigation will be achieved by either A or B below:

TABLE 4:
(A) Wetland Mitigation Ratios for Biologically Superior Deviation

HABITAT TYPE	MITIGATION RATIO
Coastal Wetlands	8:1
Riparian Forest or Woodland (oak, sycamore, or willow)	6:1
Riparian Scrub	4:1
Riparian Scrub in Coastal Overlay Zone	6:1
Freshwater Marsh	4:1
Freshwater Marsh in Coastal Overlay Zone	8:1
Natural Flood Channel	4:1
Disturbed Wetlands	4:1
Vernal Pools	4:1 to 8:1
Marine Habitats	4:1
Eelgrass Beds	4:1

Note: Mitigation must be provided within or adjacent to the MHPA.

(B) Alternatively, for lands granted in fee title to the City in the MHPA, standard mitigation pursuant to Table 2 of the City's Biology Guidelines and a perpetual endowment can be considered as a biologically superior alternative. The perpetual endowment will be provided to cover the cost for the long-term management and monitoring of the mitigation area. The endowment will be calculated so that the principle will be non-wasting, allowing for all annual management and monitoring to be funded from the accrued interest. The amount of the endowment will be established by the Park and Recreation Department with assistance from the Financial Management Department. The endowment will be used to pay for the long-term management of the mitigation area and to off set any public funding needed to manage these areas allowing public management funding to be concentrated in other areas of the MHPA.

4. *The United States Fish and Wildlife Service and California Department of Fish and Game have concurred with the Biologically Superior Alternative.*

Approval shall come in the form of a written response supporting the biologically superior alternative during the CEQA public review process in which the proposed biologically superior mitigation has been evaluated. Lack of an unequivocal response within the CEQA review period is deemed to be concurrence.